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No. 00-1032

Supreme Court, U.S.
FILED
APR 6 2001
CLERK

IN THE

Supreme Court of the United States

STATE OF CONNECTICUT, *ex rel.* Richard Blumenthal, Attorney General; TOWN OF LEDYARD; TOWN OF NORTH STONINGTON; TOWN OF PRESTON,
Petitioners,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR; GALE A. NORTON, Secretary of the Interior; JAMES H. MCDIVITT, Assistant Secretary of the Interior for Indian Affairs; FRANKLIN KEEL, Eastern Area Director, Bureau of Indian Affairs,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12pp

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Petitioners State of Connecticut, *ex rel.* Richard Blumenthal, Attorney General and Towns of Ledyard, North Stonington, and Preston, Connecticut respectfully submit this reply to the brief in opposition to the petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit in this case.

REPLY

1. The Secretary asserts that "acquired under this subsection," as used in the Connecticut Indian Land Claims

Settlement Act ("Settlement Act" or "Act"), 25 U.S.C. §§ 1751 *et seq.*, means acquired with Settlement Act funds and that any other interpretation renders the language superfluous. *See* Gov't Opp'n Br. at 12. The phrase "acquired under this subsection" has meaning, but not that claimed by the Secretary. If the phrase were omitted from the Settlement Act, the operable provisions would read that land within the settlement lands shall be held in trust and land located outside the settlement lands shall be held in fee by the Mashantucket Pequot Tribe ("Tribe") without regard to who owned the land. The congressional direction cannot work unless the land is first acquired by or on behalf of the Tribe. The subject phrase modifies the noun "land" to make clear that ownership or acquisition by the Tribe is a prerequisite to trust status. Thus, the phrase is not rendered superfluous if the Secretary's construction is rejected.

The Secretary argues, in effect, that the Settlement Act does little other than resolve a land claim and is not intended to constrain her authority in dealing with this Tribe beyond the disposition of the settlement fund created by Congress. *See* Gov't Opp'n Br. at 13-14. In support of that position, the Secretary would tie all provisions of the Act to the expenditure of the Settlement Fund. By this construction, the Act's constraints on the Secretary's authority expired when the Fund was exhausted over 15 years ago. This very narrow scope of interpretation has not been applied to other settlement acts, as evidenced by the language of the savings clause of the Indian Land Consolidation Act ("ILCA"), passed several months before the Settlement Act.

The Secretary, however, misconstrues petitioners' reliance on the ILCA. Since passage of the ILCA predates the Connecticut Act, the ILCA cannot explicitly reference the Settlement Act as it does several other earlier settlement acts, such as the Maine Indian Land Claims Settlement Act ("Maine Act"), 25 U.S.C. §§ 1721 *et seq.* The ILCA makes clear that Congress intended that specific Indian settlement

acts would not be superseded by the general trust acquisition authority of the Indian Reorganization Act ("IRA"), which the Secretary claims in this case. In effect, specific settlement acts are intended to supplant the general trust acquisition authority of the IRA for the Indian groups subject to such acts. Petitioners simply argue that the Settlement Act, although later passed, is one of the settlement acts, as referenced in the ILCA, that "authorizes, prohibits or restricts the acquisition of land for Indians with respect to any specific tribe, reservation or state." 25 U.S.C. § 2202. As such, the authorizations, prohibitions and restraints of the Settlement Act itself, not section 5 of the IRA, govern trust acquisitions for the Connecticut Tribe. This reading is consistent with both the ILCA and with the savings clause of the Settlement Act, which preserves only those other Indian laws that are not inconsistent with the Act. *See* 25 U.S.C. § 1758(a).

2. The Secretary relies heavily on the Maine Settlement Act as the model for and basis of interpretation of the Connecticut Act. *See* Gov't Opp'n Br. at 13. A brief explanation of the Maine Act demonstrates that this reliance is largely misplaced. Section 1724(d) of the Maine Act, is quite similar to section 1754(b) of the Settlement Act. The subsection is titled "apportionment of land acquisition fund," and delineates the sums appropriated for the three tribes covered by the act. *See* 25 U.S.C. § 1724(d). Subsection 1724(d) of the Maine Act states, in language parallel to 1754(b)(7) and (b)(8) of the Settlement Act, that, "the first 150,000 *acres* acquired for the Penobscot Nation *within the area* described in the Maine Implementing Act as eligible to be included within . . . the Penobscot Indian Territory *shall be held in trust by the United States*." 25 U.S.C. § 1724(d) (emphasis added). Section 1724(d) continues: "*Land* or natural resources acquired *outside the boundaries* of the aforesaid area[ ] *shall be held in fee* by the respective tribe or nation, and the United States shall have no further trust responsibility with respect thereto." *Id.* (emphasis added).

This language of the Maine Act, like the parallel language of the Settlement Act, covers all eventualities: land within the boundaries goes into trust; land outside the boundaries remains in fee. If the Maine Act is the model for the Settlement Act here, as the Secretary argues, it surely contains no indication or suggestion that the trust status of land in Maine depends upon the source of funds used to purchase the land. And, like the Settlement Act, the trust status of Indian land in Maine depends wholly on the location of the land as being within or outside the boundaries described in the act. If the Maine Act is the model for the Settlement Act, the Secretary's implied limitation based on the source of funds must be rejected.

Section 1754(b)(9) of the Settlement Act and section 1724(e) of the Maine Act contain verbatim language regarding the condemnation powers of the United States to take land on behalf of the tribes from landowners. *Compare* 25 U.S.C. § 1724(e) *with* 25 U.S.C § 1754(b)(9). Section 1724(e) of the Maine Act contains an additional sentence that is not found in the Settlement Act: "Except for the provisions of this subchapter, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." The Secretary acknowledges that this language supersedes her trust acquisition authority under section 5 of the IRA for Indians in Maine. *See* Gov't Opp'n Br. at 13. The Secretary argues, however, that the absence of this language in the Settlement Act shows an intent by Congress that her trust acquisition authority for the Tribe is unrestricted as long as the Tribe's land was not purchased with Settlement Act funds. *Id.* at 14-15 n.5.

This position is wrong for several reasons. The broad prohibition of section 1724(e) of the Maine Act was not intended to cover the three tribes identified in the authorizations and prohibitions of section 1724(d) of the act. The broad prohibition is unnecessary for and superfluous to

trust acquisitions for those three groups of Indians because the total trust authority of the Secretary for the benefit of those groups is comprehensively set forth in section 1724(d) of the Maine Act, in the same fashion as the trust authority for the Tribe is set forth in section 1754(b) of the Settlement Act. The broad prohibition included in the Maine Act assures that the Secretary has no trust acquisition authority for the benefit of any other Indians in the state, or as the prohibition reads, "for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine." 25 U.S.C. § 1754(e). The legislative history explicating this section of the Maine Act states: "The Secretary is limited in his ability to acquire land or natural resources for *any Indians or Indian tribes in Maine* to the authorities provided in this Act." S. Rep. No. 96-957, at 25 (1981) (emphasis added). Although the language of section 1724(d) referring to geographic boundaries of the enumerated tribes was sufficient to limit trust acquisitions for those groups of Indians, only the broad prohibition would cover other Indian groups in Maine.

A similar broad prohibition could not be used in Connecticut because the Settlement Act was not intended to limit the rights of any Indians other than the Mashantucket Pequot Tribe. As stated in the legislative history: "This finding [§ 1751(e)] is intended to make it clear that [the Act] in no way affects the interests, whatever they may be, of the Paucatuck Pequot Tribe (also known as the Eastern Pequot Tribe)." S. Rep. No. 98-222, at 10 (1983). It would have been inconsistent with this intent to add a general prohibition of the Secretary's section 5 authority, as in the Maine Act. But the absence of a general prohibition cannot reasonably be used to construe the limitation of section 1754(b) of the Settlement Act more narrowly than the parallel provisions of the Maine Act. To make clear that the Secretary's section 5 authority was suspended for the Tribe, Congress explained section 1754(d) by stating: "The Secretary's ability to acquire land for the Tribe *is limited to the authority provided by this*

Act." S. Rep. No. 98-222, at 14 (emphasis added). By contrast, the parallel explanation of section 1724(e) of the Maine Act, provides: "The Secretary is limited in his ability to acquire land or natural resources for any Indians or Indian Tribes in Maine to the authorities provided by this Act." S. Rep. No. 96-957, at 25. The Secretary's argument under the Maine Act is, at best wrong, and, at worst, disingenuous

3. The Secretary asserts that this case is a "poor vehicle" for the Court to reconsider the Indian canon of construction because it was unnecessary for the Second Circuit to rely on the canon, because the Indian Gaming Regulatory Act ("IGRA") was passed after the Settlement Act, and because the Tribe here had not achieved its considerable wealth from gaming at the time the Settlement Act was passed. *See* Gov't Opp'n Br. at 19-20. These arguments substantially mischaracterize the position of petitioners.

As discussed in the petition at 21-28, the Indian canon is a statutory construction tool devised to address the unequal bargaining power historically present in the negotiation of treaties between Indian tribes and the United States. Petitioners' argument is that the Indian canon should not *automatically* be used to ascertain congressional intent whenever the statute in question relates directly or tangentially to Indians.* Rather, resort to the canon should

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* In this regard, petitioners' argument bears strong resemblance to the position taken by the United States in *Chickasaw Nation v. United States*, No. 00-507, *cert. granted*, __ U.S. __ (Jan. 22, 2001), currently pending before this Court. Defending the lower court's nonapplication of the Indian canon in *Chickasaw Nation*, the United States states that "[l]ike other canons of statutory construction, the Indian canon should be used to resolve, rather than to create, doubt" and that "this Court's practice of using traditional tools of statutory construction to insure that it reaches a result consistent with congressional intent, *as opposed to reflexively resorting to the Indian canon of construction* in interpreting federal tax statutes to reach a result contrary to congressional intent." Brief for the United States, *Chickasaw Nation v. United States*, No. 00-507 (filed Dec.

depend upon a factual inquiry as to the circumstances that might warrant its use to mitigate unequal bargaining power. Petitioners do not contend that all Indians are wealthy or that the canon should not apply because the Tribe is now wealthy or engaged in gaming. While, in general, there may be less reason to resort to the Indian canon to divine congressional intent in contemporary acts of legislation or in circumstances were gaming interests are underwriting efforts to gain tribal recognition or trust annexation, neither the trial court nor the Second Circuit engaged in that sort of factual inquiry. Such an inquiry would most likely show that there was no inequality of bargaining power, and that the canon should not have been considered. Both courts, however, simply accepted the Secretary's argument that the Indian canon was appropriate to consider. The district court rejected its applicability, and the court of appeals reversed, finding that the canon required an interpretation that favored the Tribe. *See* Pet. at 17a-19a, 45a-46a.

Contrary to the government's assertion (Gov't Opp'n Br. at 18-19), the Second Circuit most assuredly relied on the Indian canon to reach its result. *See* Pet. at 17a-19a. While it did not declare that the Indian canon was the *sine qua non* of its holding, seldom, if ever, do courts state that a canon of construction is the sole or determinative basis of their holdings. Petitioners respectfully suggest that the canon is as relevant to the Second Circuit's holding here as it is in any case.

4. As with the Indian canon, the Secretary asserts that the Second Circuit's deference to the agency's interpretation of

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22, 2000) at 12, 13 (citation omitted, emphasis added). Petitioners here agree. While the canon can be a useful tool of interpretation when the predicates for its application are present, resort to a "reflexive" application of it in cases such as this one are contrary to this Court's practice and will lead to results that are inconsistent with congressional intent. *See* Pet. at 21-28.

the Settlement Act was not necessary (Gov't Opp'n Br. at 20-21), despite the fact that the court accepted the interpretation of the Act that is precisely the "new" interpretation offered by the agency to justify the very trust acquisition at issue in this litigation. *See* Pet. at 20a-22a. The Secretary would minimize the import of the agency's complete reversal of position by stating that the individual who reversed positions was a subordinate employee and that his reversal was accompanied by a "reasoned analysis." *See* Gov't Opp'n Br. at 21 (quoting Pet. at 21a). While it is true that everyone in the Department of the Interior is subordinate to the Secretary, regional solicitors are the principal legal officers charged with interpreting Indian statutes to guide agency actions. The regional solicitor at issue was not overruled by a superior; he reversed himself. The Secretary did not arrive at a different interpretation, but explicitly relied on the new interpretation by the regional solicitor in the written decision memorandum supporting the annexation decision in this case. Moreover, there was no reasoned analysis supporting the new interpretation. The "no" of the prior opinion simply became a "yes" in the new opinion, with citation to the same statutory language, but avoidance of the legislative history used to support the prior opinion. *See* Pet. at 43a-44a, n.23. If this administrative interpretation warrants deference, there is no interpretation that does not.

5. Finally, the Secretary urges the Court to deny review because petitioners' claims that her action improperly diminishes the sovereignty of the State and the jurisdiction of the Towns are either premature or hypothetical. *See* Gov't Opp'n Br. at 21-22. In May of 1995, the Secretary approved the trust acquisition at issue here over the well-documented objections of petitioners. The Tribe has made other applications to the Secretary to take additional land into trust, and expressed an intent to process yet more trust requests. The interpretation of the Settlement Act endorsed by the district court and urged here by petitioners would preclude all

of these trust acquisitions and prevent any further erosion of the sovereign reach of the State. The fact that some issues in this case are again before the district court does not make this petition for review premature or interlocutory in nature. The Second Circuit issued an opinion and final order on the dispositive issue in the case on which petitioners now seek review.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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April 5, 2001